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# If We Don't Bring Them to Court, the Terrorists Will Have Won

## REINVIGORATING THE ANTI-TERRORIST ACT AND GENERAL JURISDICTION IN A POST-*DAIMLER* ERA

### INTRODUCTION

For decades, hundreds of Americans have been injured or killed in terrorist attacks at home or abroad.<sup>1</sup> Over that period, the American legislature has been firmly committed to bringing terrorists, and their sponsors, who attack Americans to justice in American courts.<sup>2</sup> In 2013 alone, according to the United States Department of State, at least thirty-five Americans were injured, killed, or kidnapped by terrorists while abroad.<sup>3</sup> Recently, on July 7, 2016, Sean Copeland and his eleven-year-old son Brodie were killed in the Nice, France terror attack<sup>4</sup> perpetrated by a “soldier” of ISIS.<sup>5</sup> The Copelands, like all other Americans, should be able to find justice at home.

Americans should always be able to bring those who terrorize them to court, but the Supreme Court’s recent

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<sup>1</sup> BRENDA J. LUTZ & JAMES M. LUTZ, *TERRORISM IN AMERICA* 49 (2007); see also 137 CONG. REC. 3304 (1991) (statement of Sen. Grassley) (In the first “10 months since the ATA has been introduced. . . there have been more than 70 reported acts of terrorism committed against Americans . . . around the world.”).

<sup>2</sup> It is clear Congress remains committed to allowing American litigants to sue their terror attackers or sponsors. For instance, on September 30, 2016, the United States Senate overrode a presidential veto to pass a controversial bill, the Justice Against Sponsors of Terror Act, which would allow American litigants to sue the Saudi government for any involvement in the September 11, 2001 terror attacks despite the Obama administration’s strong stance against the bill. See Jennifer Steinhauer et al., *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. TIMES (Sept. 28, 2016), [http://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html?\\_r=0](http://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html?_r=0) [<https://perma.cc/6QGJ-7XH5>]; see also Justice Against Sponsors of Terrorism Act, S 2040, 114th Cong. (2016) (enacted).

<sup>3</sup> *Terrorism Deaths, Injuries and Kidnappings of Private U.S. Citizens Overseas in 2013*, U.S. DEP’T OF STATE <http://www.state.gov/j/ct/rls/crt/2013/224833.htm> [<https://perma.cc/ZCP7-3DHN>].

<sup>4</sup> Ray Sanchez, *Attack in Nice: Texas Father and Son, 11, Among Victims*, CNN (July 15, 2016), <http://www.cnn.com/2016/07/15/europe/nice-attack-american-victims/> [<https://perma.cc/DZP7-ZE69>].

<sup>5</sup> Alissa J. Rubin & Aurelien Breeden, *ISIS Claims Truck Attacker in France Was Its ‘Soldier’*, N.Y. TIMES (July 16, 2016), [http://www.nytimes.com/2016/07/17/world/europe/isis-nice-france-attack.html?\\_r=0](http://www.nytimes.com/2016/07/17/world/europe/isis-nice-france-attack.html?_r=0) [<https://perma.cc/54E6-RHP8>].

decisions in *Goodyear Dunlop Tires Operations S.A. v. Brown*<sup>6</sup> and *Daimler AG. v. Bauman*<sup>7</sup> have complicated their ability to do so. In *Goodyear* and *Daimler* the Supreme Court clearly established that in order for a foreign defendant to be subject to general jurisdiction in American courts, the defendant must be “essentially at home” in the United States. Terrorist organizations and their sponsors, however, are a unique subset of foreign defendants, and American courts have reached different results when tasked with determining whether they can exercise general jurisdiction over such defendants.

Consider the tragic story of the Sokolow family. On January 27, 2002, Mark Sokolow and his family, Americans, were visiting their oldest daughter in Israel.<sup>8</sup> While on their visit, a suicide bomber working on behalf of the Palestine Liberation Organization (the PLO) and the Palestinian Authority (the PA)<sup>9</sup> walked to Jaffa Street in downtown Jerusalem and at 12:30pm, she detonated an explosive device killing one elderly man and injuring over 150 other individuals.<sup>10</sup> As a consequence of the explosion, Rena Sokolow, Mark’s wife, was knocked to the ground “with her leg bleeding profusely and a bone sticking out.”<sup>11</sup> As she was on the ground she said she “saw a woman’s severed head lying about three feet away [from her].”<sup>12</sup> The Sokolows’ youngest daughter Jamie said her “whole face felt like it was on fire,” and she ultimately “suffered a severe eye injury.”<sup>13</sup> In 2005, the Sokolows and about forty other plaintiffs filed suit in the Southern District of New York against the PA and the PLO<sup>14</sup> pursuant to the Anti-Terrorism Act of 1992 (ATA).<sup>15</sup> After nearly a decade of protracted litigation, the plaintiffs prevailed

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<sup>6</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

<sup>7</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>8</sup> Benjamin Weiser, *Palestinian Groups Are Found Liable at Manhattan Terror Trial*, N.Y. TIMES (Feb. 23, 2015), <http://www.nytimes.com/2015/02/24/nyregion/damages-awarded-in-terror-case-against-palestinian-groups.html> [<https://perma.cc/UK4N-KABN>].

<sup>9</sup> The Palestinian Authority may interchangeably be referred to as the Palestinian National Authority. See *Palestinian Authority (PA)*, ENCYC. BRITANNICA <http://www.britannica.com/topic/Palestinian-Authority> [<https://perma.cc/F4RH-6JYR>].

<sup>10</sup> First Amended Complaint at 17–18, *Sokolow v. Palestine Liberation Org.*, 2011 WL 1345086 (S.D.N.Y. Mar. 30, 2011) (No. 04 CV 00397(GBD)).

<sup>11</sup> Weiser, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> First Amended Complaint, *supra* note 10, at \*1–5.

<sup>15</sup> 18 U.S.C. §§ 2333, 2334 (2012). The Antiterrorism Act of 1992 was passed in response to a 1985 terror attack where the PLO shot and killed an American aboard an Italian cruise liner sailing in the Mediterranean. When Congress passed the ATA they did so to deter and punish acts of international terrorism by removing jurisdictional hurdles to empower American victims of terror attacks to get justice in American courts. For an in-depth discussion of the ATA see *infra* Section I.C.

in their suit against the PA and the PLO and won a staggering judgment in the amount of \$655.5 million in treble damages, non-inclusive of court costs and attorney's fees.<sup>16</sup> With all relevant fees and interest considered, the judgment may amount to as much as \$1.15 billion.<sup>17</sup>

In 2011, the *Sokolow* court concluded it could consider the PA and the PLO as "essentially at home" in America<sup>18</sup> despite the U.S. Supreme Court's recent 2011 and 2014 rulings in *Goodyear* and *Daimler*, respectively, and thus let the Sokolows' case proceed. But not all courts have agreed with the Southern District's approach; thus, some terror victims have had their cases dismissed with prejudice for want of general personal jurisdiction by United States District Courts and have been left without remedy.<sup>19</sup>

For instance, consider the case of Esther Klieman. On March 24, 2002, Ms. Klieman, an American schoolteacher, was shot and killed by terrorists affiliated with the PA and the PLO when they attacked a public bus with machine guns near Neve Tzuf in Israel.<sup>20</sup> In 2004, Ms. Klieman's estate filed her case in the District Court for the District of Columbia.<sup>21</sup> In *Estate of Klieman v. Palestinian Authority*, the District Court for the District of Columbia decided that the PA and the PLO were

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<sup>16</sup> Judgment at 7, *Sokolow v. Palestine Liberation Org.*, 2011 WL 1345086 (S.D.N.Y. Mar. 30, 2011) (No. 04 CV 00397(GBD)). The lawsuit in *Sokolow* was filed on behalf of about forty interested plaintiffs, and thus, the awarded \$655.5 million dollars will be split amongst a number of plaintiffs. See First Amended Complaint, *supra* note 10, at \*1–5, *Sokolow*, 2011 WL 1345086; Judgment, *supra*, at 7.

<sup>17</sup> See Brooke Singman, *Obama Admin Mulling Intervention in Massive Judgment Against Palestinians in Terror Case*, FOX NEWS (Aug. 03, 2015), <http://www.foxnews.com/politics/2015/08/03/white-house-mulling-intervention-in-massive-judgment-against-palestinians-in/> [https://perma.cc/RAV9-2H7B].

<sup>18</sup> *Sokolow v. Palestine Liberation Org.*, 2014 WL 6811395, at \*2 (S.D.N.Y. Dec. 1, 2014); see also *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 87–88 (D.R.I. 2001) (recognizing the purpose of the United States contacts test is intended to "geographically expand[]" the power of federal courts. The court recognized the facts that the PLO maintains offices in Washington D.C. headed by individuals affiliated with both the PLO and the PA, the PLO and PA spend a significant amount of money on advocacy activities, and conduct significant fundraising and lobbying activities sufficient to subject them to general jurisdiction in American courts.); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 51 (2d Cir. 1991) (PA and PLO's non-UN based activities in the United States could be used as a basis to exercise personal jurisdiction against the organizations.).

<sup>19</sup> *Legal Considerations: Enforcement of Judgments*, U.S. DEPT OF STATE, <http://travel.state.gov/content/travel/en/legal-considerations/judicial/enforcement-of-judgments.html> [https://perma.cc/YG7C-DLAC]; see *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 250 (D.D.C. 2015) ("[T]his case will be dismissed with prejudice . . ."); see also *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 37 (D.D.C. 2015) ("[T]his Court does not have personal jurisdiction . . . [a]ccordingly all claims are dismissed . . ."); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 55 (D.D.C. 2015) ("[T]his Court does not have personal jurisdiction . . . [a]ccordingly, all claims are dismissed.").

<sup>20</sup> *Estate of Klieman*, 82 F. Supp. 3d at 240.

<sup>21</sup> *Id.*

subject to such general jurisdiction in the District Court for the District of Columbia due to “their ‘continuous and systematic’ contacts with the United States.”<sup>22</sup> However, following the Supreme Court’s 2014 decision in *Daimler*, the PA and the PLO moved for the district court to reconsider its decision on the grounds that *Daimler* constituted an intervening change in the law,<sup>23</sup> specifically, that the court never considered whether the PA and the PLO are “essentially at home” in the United States.<sup>24</sup> The court agreed with the PA and PLO’s argument that *Daimler* represented such a change in general personal jurisdiction law and further agreed that the court had not previously considered whether the PA and PLO were “essentially at home” in the United States.<sup>25</sup> In light of this new standard, the court concluded that it could no longer exercise general jurisdiction over the PA and the PLO despite its previous 2006 decision to the contrary.<sup>26</sup> The district court judge then dismissed the case with prejudice<sup>27</sup> and denied Ms. Klieman’s estate justly deserved relief in any United States court.

Similarly, in *Livnat*, the District Court for the District of Columbia disagreed with the application of *Daimler* by the Southern District of New York in *Sokolow*.<sup>28</sup> In *Livnat*, U.S. citizens were killed or injured following an attack at a Jewish holy site that was orchestrated and carried out by the PLO.<sup>29</sup> The diametrically different treatments of *Daimler* by courts in the Second and D.C. Circuits has teed this issue up for a circuit split,<sup>30</sup> but more importantly, plaintiffs who have been injured by horrific PLO- and PA-sponsored terrorist attacks abroad are

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<sup>22</sup> *Id.* at 239–40.

<sup>23</sup> *Id.* (“In light of the Supreme Court’s recent decision in *Daimler* . . . the PA and the PLO again move for reconsideration of this Court’s rulings on personal jurisdiction.” (internal citation omitted)). Courts may reconsider prior holdings or interlocutory orders if there is “(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or to prevent manifest injustice.” *Wash. Nat’l Life Ins. Co. v. Morgan Stanley & Co. Inc.*, 974 F. Supp. 214, 219 (S.D.N.Y. 1997). An intervening change in the law “occur[s] when the law has been changed by a body with greater authority on [an] issue.” 18B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4478 (2d ed. 1987). Such a change can be caused by a higher court, or by a statutory or equivalent enactment. *Id.*

<sup>24</sup> *Estate of Klieman*, 82 F. Supp. 3d at 242.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 250.

<sup>27</sup> *Id.*

<sup>28</sup> *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 31 (D.D.C. 2015). While the Second Circuit found the PA and PLO “essentially at home” in *Sokolow*, the D.C. Circuit applied *Daimler* differently and concluded general jurisdiction may not be exercised over these defendants. *Id.*

<sup>29</sup> *See id.* at 20–21.

<sup>30</sup> Julie Triedman, *A Split over Terror Suits*, THE AM. LAWYER (Apr. 27, 2015), <http://www.americanlawyer.com/id=1202724025697/A-Split-Over-Terror-Suits?sIreturn=20160022131155> [https://perma.cc/P9DM-R5UL].

being denied relief against these organizations. *Sokolow*, *Klieman*, and *Livnat* are each currently being appealed.<sup>31</sup>

This note begins by offering background on the history of the Palestine Liberation Organization and the Palestinian Authority in Part I, with particular emphasis on how these entities are treated by American courts. This part then explains specific personal jurisdiction and general personal jurisdiction and discusses the Anti-Terrorism Act of 1992. Part II of this note highlights how the United States District Courts for the District of Columbia and Southern District of New York have treated the Supreme Court's recent decision in *Daimler AG v. Bauman* with regard to defendants like the PA and the PLO, and how their differing treatments have led to drastically different results for plaintiffs in their respective jurisdictions. While the Southern District of New York held that the PA and PLO are subject to general jurisdiction in United States District Courts, the District Court for the District of Columbia treated *Daimler* as an intervening change in general jurisdiction law such that American plaintiffs, injured or killed in terrorist attacks abroad, are afforded no avenue for relief in United States courts.<sup>32</sup> In some instances, this has led to plaintiffs' cases being dismissed with prejudice, effectively ending—without remedy—costly cases that are often at least a decade old.<sup>33</sup> By the time of dismissal, plaintiffs or their estates will have spent tens of thousands of dollars litigating these cases with no relief, leaving the already injured plaintiffs worse off than they were before.

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<sup>31</sup> *Livnat*, 82 F. Supp. 3d 19, *appeal docketed*, No. 15-7024 (D.C. Cir. Mar. 18, 2015); *Estate of Klieman*, 82 F. Supp. 3d 237, *appeal docketed*, No. 15-7034 (D.C. Cir. Apr. 8, 2015). On August 31, 2016, the Second Circuit decided the *Sokolow* appeal in *Waldman v. Palestine Liberation Organization*, 835 F.3d 317 (2d Cir. 2016). The Second Circuit vacated the judgment of the District Court after finding that while “[t]he terror machine gun attacks and suicide bombings that triggered this suit . . . were unquestionably horrific. . . . The district court could not constitutionally exercise either general or specific jurisdiction over the defendants in this case.” *Id.* at 344. On remand the Second Circuit has instructed the district court to “dismiss the case for want of jurisdiction.” *Id.* After this opinion, plaintiffs injured in terror attacks will continue to be without recourse in American federal courts. This note, which already took the position that the Southern District's reasoning was incorrect remains important because the Second Circuit's decision in *Waldman* fails to provide an avenue of domestic recourse for American terror victims. Thus, the jurisdictional issues preventing Americans from suing their terror attackers and those who sponsor them in the post-*Daimler* era remain unresolved. See Part II.

<sup>32</sup> See, e.g., *Estate of Klieman*, 82 F. Supp. 3d at 250 (dismissing case with prejudice due to lack of jurisdiction).

<sup>33</sup> See, e.g., *id.* (complaint filed in 2004); see also *Sokolow v. Palestine Liberation Org.*, No. 04 Civ. 397(GBD), 2014 WL 6811395 (S.D.N.Y. Dec. 1, 2014) (complaint filed in 2005). *Klieman* was ultimately dismissed in 2015. *Estate of Klieman*, 82 F. Supp. 3d at 250. *Sokolow* was resolved in 2015. *Sokolow v. Palestine Liberation Org.*, 04 CIVIL 00397 (GBD), 2015 WL 10852003 (S.D.N.Y. Oct. 1, 2015).

Part III of this note proposes two solutions for the general jurisdiction problem created by *Daimler*. First, courts should limit application of the general jurisdiction framework to individuals and corporations as the Supreme Court has not specifically extended this framework beyond these types of associations. Specifically, lower federal courts could choose not to apply the general personal jurisdiction framework to unincorporated associations and non-sovereign state organizations; a solution likely more workable in the context of non-sovereign state organizations. Second, and perhaps more compelling, is that cases against the PA, the PLO, and any similarly situated organizations should be treated as the type of “exceptional case” alluded to in Footnote 19 of *Daimler*. Public policy strongly favors that the courts find a way to exercise general jurisdiction over terrorists and sponsors of terror, especially in light of the congressional intent recorded during the passage of the Anti-Terrorism Act of 1992. The fact that Americans who have already been injured abroad would be further injured, but this time by the American judiciary in the post-*Daimler* era is an unacceptable result and must be addressed.

I. BACKGROUND ON THE PA AND PLO, GENERAL AND SPECIFIC JURISDICTION, AND THE ATA

A. *History and Recognition of the PA and the PLO*

In 1964 the Palestine Liberation Organization was founded with the purpose to “mobilize the Palestinian people to recover their usurped homeland.”<sup>34</sup> The PLO was formed in response to the open question of Palestine’s place in inter-Arab politics, and the growth of Palestinian nationalist activity.<sup>35</sup> In 1974, the Arab League, a confederation of twenty-two Arab nations,<sup>36</sup> “recognized the PLO as the sole ‘legitimate representative of the Palestinian people.’”<sup>37</sup> Since then, the

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<sup>34</sup> *Arabs Create Organization for Recovery of Palestine*, N.Y. TIMES, May 29, 1964, at A5.

<sup>35</sup> Glenn E. Robinson, *Palestine Liberation Organization*, THE OXFORD ENCYC. OF THE ISLAMIC WORLD, <http://www.oxfordislamicstudies.com/article/opr/t236/e0618#DevelopmentofthePLO> [https://perma.cc/YXN3-X2E4].

<sup>36</sup> Jonathan Masters & Mohammed Aly Sergie, *The Arab League*, COUNCIL ON FOREIGN RELATIONS (Oct. 21, 2014), <http://www.cfr.org/middle-east-and-north-africa/arab-league/p25967> [https://perma.cc/ZQ4L-ZSTM].

<sup>37</sup> *Palestine Liberation Organization*, PERMANENT OBSERVER MISSION OF THE STATE OF PALESTINE TO THE UNITED NATIONS N.Y., <http://palestineun.org/about-palestine/palestine-liberation-organization/> [https://perma.cc/7UV8-ZXR2]; see also Niyazi Gunay, *Arab League Summit Conferences, 1964–2000*, THE WASH. INST. (Oct. 19, 2000), <http://www.washingtoninstitute.org/policy-analysis/view/arab-league-summit-conferences-196420>

PLO has represented Palestine at the United Nations and in other forums.<sup>38</sup>

The Palestinian Authority is a governing organization for Palestinians in the West Bank and Gaza Strip.<sup>39</sup> The PA was formed in 1994 as part of an agreement reached between the PLO and Israel during secret peace talks.<sup>40</sup> During these talks, Israel and the PLO agreed that governance in the West Bank and Gaza would be handed over to Palestinian officials and thus the PLO formed the PA to handle governance in those areas.<sup>41</sup> Under this agreement, the territories effectively remained under Israeli control while the PA received limited self-governance capabilities.<sup>42</sup> In 2011, Mahmoud Abbas, the President of the PA, requested that the UN Security Council recognize the existence of an individual Palestinian state, but his request was denied, in part, because the United States vowed to veto such a request.<sup>43</sup> However, on November 29, 2012, the PA gained implicit recognition of Palestinian statehood when the UN upgraded its status from “permanent observer” to “nonmember observer state.”<sup>44</sup> Permanent observers only have access to certain documents and meetings, but nonmember observer states may maintain permanent missions at the UN and participate as observers in the work of the General Assembly.<sup>45</sup> Palestine’s classification as a “nonmember observer state” could have interesting jurisdictional implications for the PA and the PLO in the future as Palestine moves closer towards internationally recognized statehood, but at present the PA remains a stateless government organization in the

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00 [https://perma.cc/ZNS5-U73D] (At the second Arab League Summit in 1964 the “Summit formally approved the establishment of the Palestinian Liberation Organization (PLO).”).

<sup>38</sup> *Palestine Liberation Organization*, *supra* note 37.

<sup>39</sup> *Palestinian Authority (PA)*, ENCYC. BRITANNICA, <http://www.britannica.com/topic/Palestinian-Authority> [https://perma.cc/F4RH-6JYR] (last updated Nov. 30, 2012).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; see *Sokolow v. Palestine Liberation Org.*, 60 F. Supp. 3d 509, 513 (S.D.N.Y. 2014).

<sup>42</sup> *West Bank*, THE ENCYC. BRITANNICA, <http://www.britannica.com/place/West-Bank> [https://perma.cc/42JL-TEYK] (last updated Jan. 13, 2016); *Gaza Strip*, THE COLUMBIA ELEC. ENCYC., <http://www.infoplease.com/encyclopedia/world/gaza-strip-history.html> [https://perma.cc/YNG9-US7T].

<sup>43</sup> *West Bank*, *supra* note 42.

<sup>44</sup> *Non-member States*, UNITED NATIONS, <http://www.un.org/en/sections/member-states/non-member-states/index.html> [https://perma.cc/CB7W-Q6VU] (The Holy See is the only other non-member observer state recognized by the UN.).

<sup>45</sup> *About Permanent Observers*, UNITED NATIONS, <http://www.un.org/en/sections/member-states/about-permanent-observers/index.html> [https://perma.cc/WYS9-V48D]; *Non-member States*, *supra* note 44.



eyes of the United States and many of its Western allies.<sup>46</sup> For purposes of jurisdiction in United States courts, the PA and PLO, in their current posture, should be viewed as stateless with no home, or non-sovereign state organizations.

In terms of treatment of the PA and the PLO in United States District Courts, most courts have held that the United States—which does not recognize Palestine as a state—should treat the PA and PLO as unincorporated associations “without . . . legal identit[ies] apart from [their] membership[s], formed for specific objectives.”<sup>47</sup> Typically, for purposes of jurisdiction and service of process, unincorporated associations are treated as present in all localities where they have members.<sup>48</sup> Therefore, both the PA and PLO only have legal identity jurisdictionally in the United States where its members may be found. However, legal identity is not enough to make the PA and PLO answerable in United States courts. Even where legal identity exists, these organizations can only be made to answer in United States District Courts if a causal relationship exists between the organizations’ United States contacts and the suit in question.<sup>49</sup> The PA and PLO’s lobbying activity in the United States is insufficient to support personal jurisdiction for terror-related trials because the former is not a proper basis of jurisdiction for the latter as the two are unrelated.<sup>50</sup>

At least one district court has argued that the PA and PLO would be better classified and treated by United States District Courts as non-sovereign state organizations rather than unincorporated associations. In *Livnat v. Palestinian Authority*, the D.C. District Court suggested as non-sovereign

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<sup>46</sup> Evan Bartlett, *Here Are All the Countries That Recognise Palestinian Statehood*, THE INDEP., <https://www.indy100.com/article/here-are-all-the-countries-that-recognise-palestinian-statehood--xkVle9I-8e> [<https://perma.cc/PJ86-CDMU>].

<sup>47</sup> *Klinghoffer v. S.N.C. Achille Lauro Ed.*, 739 F. Supp. 854, 858 (S.D.N.Y. 1990); *see also* *Sokolow v. Palestine Liberation Org.*, 60 F. Supp. 3d 509, 523–24 (S.D.N.Y. 2014) (The PA and PLO “are most appropriately treated as unincorporated associations.”); *see also* *Estates of Unger ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 89 (D.R.I 2001) (“It has previously been determined that the PLO qualifies as an unincorporated association . . .”).

<sup>48</sup> Karl Oakes, Annotation, *Unincorporated Associations*, 29A Fed. Proc., Law.’s ed. § 69:37 (2016).

<sup>49</sup> *See infra* Section I.B for a discussion on the difficulties presented in trying to exercise specific personal jurisdiction or general personal jurisdiction over the PA or the PLO.

<sup>50</sup> *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 342 (2d Cir. 2016) (“[T]he connections the [PA and PLO] do have with the United States—the Washington, D.C. and New York missions—revolve around lobbying activities that are not proscribed by the ATA and are not connected to the wrongs for which the plaintiffs here seek redress.” Therefore, the Second Circuit found, deciding the *Sokolow* appeal in *Waldman*, that the PA and PLO’s lobbying activity in the United States is insufficient to support specific jurisdiction over these organizations in terror trials.).

state organizations the PA and PLO “should be amenable to suit for all purposes [in] the place where it governs . . . [T]he West Bank, not the United States.”<sup>51</sup> Under this theory, the D.C. District Court suggested the PA and PLO would only be “at home” in the West Bank and could not be brought into United States courts under a theory of general jurisdiction.<sup>52</sup> Rather, plaintiffs would have to rely on a theory of specific jurisdiction to bring suit against the PA and PLO in United States District Courts.

While the lack of a United States recognized Palestinian state prevents the United States from recognizing the PA and the PLO as state sponsors of terror, the United States does recognize the PA and the PLO as sponsors of terror activities.<sup>53</sup> As recognized sponsors of terror activity, issues with jurisdiction over the PA and PLO are not going away and thus finding a workable solution so American terror victims can get relief in United States courts remains important. For instance, in the early 2000s, Yasser Arafat, then president of the PA and chairman of the PLO, redirected PA funds to groups like the al-Aqsa Martyr’s Brigade who were known to carry out terror activities in Israel.<sup>54</sup> The al-Aqsa Martyr’s Brigade has been formally classified as a terrorist group by the United States government and “operate[s] from [within] Palestinian-ruled territories” with support from the PA and PLO.<sup>55</sup> Not only do the PA and PLO allow terrorist organizations to operate within their territories, but they also provide these organizations

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<sup>51</sup> *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 30 (D.D.C. 2015).

<sup>52</sup> *Id.* See *infra* Section I.B.2 for discussion on the limitations of the general jurisdiction framework.

<sup>53</sup> Matthew Levitt, *Targeting Terror: U.S. Policy Toward Middle Eastern State Sponsors and Terrorist Organizations, Post-September 11*, THE WASH. INST. (Oct. 2002), <http://www.washingtoninstitute.org/policy-analysis/view/targeting-terror-u.s.-policy-toward-middle-eastern-state-sponsors-and-terror> [https://perma.cc/H9SV-6MCE]; *Terrorism Havens: Palestinian Authority*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/palestine/terrorism-havens-palestinian-authority/p9515> [https://perma.cc/A486-XW2N] (last updated Dec. 1, 2005); see also Benjamin Weiser, *U.S. Requests Lower Bond for Palestinian Appeal of Terror Case*, N.Y. TIMES (Aug. 11, 2015), <http://www.nytimes.com/2015/08/11/nyregion/us-requests-lower-bond-for-palestinian-appeal-of-terror-case.html> [https://perma.cc/Z7KN-Z92F] (recognizing liability for PA and PLO’s role in terror attacks in Israel).

<sup>54</sup> Jonathan Schanzer, *Huge Verdict Is the Price the Palestinian Authority Pays for Not Controlling the P.L.O.*, N.Y. TIMES (May 7, 2015), <http://www.nytimes.com/roomfordebate/2015/02/24/terror-and-the-palestinian-authority/huge-verdict-is-the-price-the-palestinian-authority-pays-for-not-controlling-the-plo> [https://perma.cc/6L5G-67Q6]; see also *Palestinian Authority Funds Go to Militants*, B.B.C. NEWS (Nov. 7, 2003), [http://news.bbc.co.uk/2/hi/middle\\_east/3243071.stm](http://news.bbc.co.uk/2/hi/middle_east/3243071.stm) [https://perma.cc/4AVK-RJ2X] (A BBC news investigation revealed that the PA was sending up to \$50,000 to the al-Aqsa Martyrs’ Brigade, a Palestinian militant group, that then used those funds to conduct attacks against Israelis.).

<sup>55</sup> *Terrorism Havens: Palestinian Authority*, *supra* note 53.

monetary aid. When the PA and PLO knowingly and deliberately provide money to terror organizations and those terror organizations kill, maim, or otherwise injure Americans abroad, it is only just that our courts are empowered to bring them to justice.

*B. Specific Personal Jurisdiction Versus General Personal Jurisdiction*

A court may exercise personal jurisdiction over a defendant in one of two ways: by exercising specific personal jurisdiction or by exercising general personal jurisdiction.<sup>56</sup> Personal jurisdiction refers generally to a court's power to exercise jurisdiction over a defendant consistent with the Due Process Clause of the Fifth Amendment to the United States Constitution.<sup>57</sup> When seeking to exercise personal jurisdiction over foreign defendants like the PA and the PLO who are "not subject to jurisdiction in any state's courts of general jurisdiction," courts may still exercise personal jurisdiction pursuant to the Federal Rules of Civil Procedure so long as exercising jurisdiction is "consistent with the United States Constitution."<sup>58</sup> In such a context, courts look to that defendant's contacts with the United States as a whole, rather than with any particular state, to judge whether they may constitutionally exercise jurisdiction over that defendant.<sup>59</sup>

Specific jurisdiction refers to a tribunal's authority over a defendant based on that defendant's activity in the particular forum.<sup>60</sup> General jurisdiction, however, recognizes certain instances where a defendant's contacts with a forum are so numerous and substantial that the defendant can be made to answer in that forum for any controversy, whether it arose out

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<sup>56</sup> This note uses the term "specific personal jurisdiction" interchangeably with "specific jurisdiction." The same treatment is afforded to "general personal jurisdiction" and "general jurisdiction."

<sup>57</sup> U.S. CONST. amend. V. The Due Process Clause through the concept of personal jurisdiction protects an individual's liberty interest in not being forced to answer for claims in a forum with which he has no connection. *Burger King Corp. v. Rudzewics*, 471 U.S. 462, 471–72. Where a tribunal exercises authority over a defendant without properly establishing personal jurisdiction, it has exceeded its powers under the Due Process Clause. *Id.* at 472.

<sup>58</sup> FED. R. CIV. P. 4(k)(2).

<sup>59</sup> *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 25 (D.D.C. 2015) (articulating the proper inquiry is with regard to the PA's contacts with the United States as a whole under the Fifth Amendment); *see also* *Estates of Unger ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 87 (D.R.I. 2001) (articulating the appropriate inquiry is with regard to the United States as a whole under the Fifth Amendment).

<sup>60</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014).

of its activity there or not.<sup>61</sup> In either case, the Due Process Clause of the Fifth Amendment informs a court's understanding of jurisdiction, and requires the court to ask whether or not terror groups or their sponsors like the PA and PLO have sufficient contacts with the United States as a whole rather than any specific jurisdiction.

A court may exercise specific jurisdiction over a defendant if that defendant's activity is "continuous and systematic" within a forum, a more permissive standard than the "essentially at home" language used in the general jurisdiction context.<sup>62</sup> The court also asks whether or not the defendant's specific activity in the forum gave rise to the suit before the court.<sup>63</sup> In certain circumstances, "the commission of certain 'single or occasional acts' in a State may be sufficient to render a [defendant] answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections."<sup>64</sup>

When a court seeks to exercise general jurisdiction over a defendant, it asserts that it has the power over said defendant "to hear any and all claims" related to that defendant's activities in the respective jurisdiction.<sup>65</sup> General jurisdiction is much more expansive than specific jurisdiction. In order to exercise general jurisdiction in the post-*Goodyear* and *Daimler* era, a defendant's "affiliations with the State in which suit is brought [must be] so constant and pervasive 'as to render [the defendant] essentially at home in the forum state.'"<sup>66</sup> The general jurisdiction standard is exacting and requires significant amounts of contact between a defendant and a forum for a court to exercise jurisdiction over the defendant.<sup>67</sup>

### 1. Inadequacy of Specific Jurisdiction

There are few instances in which a terrorist group, or its sponsors, conducting an attack abroad would be subject to

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<sup>61</sup> *Id.*

<sup>62</sup> *See Daimler*, 134 S. Ct. at 754–55 (comparing specific and general jurisdiction); *see also* 4 CHARLES ALAN WRIGHT ET AL., *supra* note 23, at § 1067.5 (stating generally that the contacts required for the exercise of general jurisdiction are "substantially higher" than the contacts required for the exercise of specific jurisdiction).

<sup>63</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011); *see also* *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945) (State may authorize personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (alteration in original)).

<sup>64</sup> *Goodyear*, 131 S. Ct. at 2853.

<sup>65</sup> *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 25 (D.D.C. 2015).

<sup>66</sup> *Id.* (quoting *Daimler*, 134 S. Ct. at 751).

<sup>67</sup> *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1069 (9th Cir. 2015).

specific jurisdiction in a United States District Court. This is because often there is an insufficient connection between the terror defendants and the desired forum in U.S. federal district courts. For a district court to exercise specific jurisdiction over a non-resident defendant, the defendant's suit-related conduct must have a substantial connection to the forum state.<sup>68</sup>

The Supreme Court explained the requisite connection required in *Walden v. Fiore*.<sup>69</sup> In *Walden*, the Supreme Court held that in order to support a finding of specific jurisdiction, courts must look to a "defendant's contacts with the forum State itself, not . . . with persons who reside there."<sup>70</sup> In *Walden*, a DEA agent had seized money from travelers connecting through Atlanta to their final destination of Nevada.<sup>71</sup> The travelers attempted to sue the DEA agent in Nevada arguing he had established connections with the forum by knowingly seizing money from them in Atlanta while knowing their final destination. The Court held that Nevada had no jurisdiction over the DEA agent, stating that contacts with people who return to a jurisdiction are too random or fortuitous to support a finding of specific jurisdiction against a defendant who otherwise has no relationship with that jurisdiction.<sup>72</sup> To hold otherwise would mean defendants could be subject to suit wherever a plaintiff decides to go, regardless of the plaintiff's connection with that jurisdiction. This would create near limitless specific jurisdiction over defendants.<sup>73</sup> Therefore, if the PA or the PLO sponsor a terrorist attack abroad that injures an American citizen who then returns home, the fact that the citizen lives in a jurisdiction in the United States would be insufficient as the basis for a court to exercise specific jurisdiction over either organization. Rather, the PA and the PLO would have to direct a terror attack towards a specific jurisdiction in the United States. The PA and PLO are not directing terrorist activities towards the United States, and without that type of action they will not be subject to specific jurisdiction in United States District Courts.

There is another instance in which courts can exercise specific jurisdiction over terror defendants like the PA and the

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<sup>68</sup> *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1122.

<sup>71</sup> *Id.* at 1119–20.

<sup>72</sup> *Id.* at 1120, 1123.

<sup>73</sup> *See, e.g., id.* at 1121–23 (The logical implication of focusing on the plaintiff as a sufficient link between the defendant and a forum for the exercise of specific jurisdiction means a defendant could be forced to litigate in any United States jurisdiction that the plaintiff decides to travel to; thus, jurisdiction would be nearly limitless.).

PLO. Courts have allowed plaintiffs to exercise specific jurisdiction over some defendants when the defendant's activity was purposefully directed at the United States or its interests abroad. For instance, in *Mwani v. Bin Laden*,<sup>74</sup> al-Qaeda bombed the U.S. Embassy in Nairobi, Kenya, and the court found that even though al-Qaeda had not directed its attack at the United States in a traditional sense, "the defendant's conduct . . . [is] such that [defendant] should reasonably anticipate being haled into [an American] court"<sup>75</sup> because the defendant had directly targeted American interests abroad. Under the reasoning in *Mwani*, where a terrorist group exhibits a conscious determination to direct their terrorist activities at the United States or its interests abroad, they should expect and realize that United States District Courts will exercise specific jurisdiction over them. However, even under this more expansive view of specific jurisdiction, the PA and the PLO will still escape the jurisdiction of American courts when they unintentionally injure Americans or American interests in terror attacks abroad precisely because they did not consciously direct those attacks at Americans or American interests. American courts should have the power to exact justice for even the unintended victims of terror abroad.

Specifically, the *Mwani* exception does not help the plaintiffs in *Livnat* or *Klieman*. In both cases, the PA and PLO did not target the United States or its interests abroad, but rather American citizens were unintended casualties of tensions between Israel and Palestine.<sup>76</sup> Presently, this type of contact is an insufficient basis for courts to exercise specific jurisdiction over the PA and the PLO, and these plaintiffs have had their claims dismissed with prejudice for lack of any type of jurisdiction. Thus, in cases where America or American interests abroad are not the target of terrorist attacks—but Americans are injured abroad as collateral damage—those Americans cannot bring their terrorist attackers into United States District Courts for relief. Such acts will almost always be too attenuated with the United States to be used as the basis of specific jurisdiction. Consequently, specific jurisdiction is almost never adequate to bring the PA and PLO into United

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<sup>74</sup> *Mwani v. Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005).

<sup>75</sup> *Id.* at 12 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

<sup>76</sup> *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 33 (D.D.C. 2015) (finding the focal point of the harm caused by defendants was the West Bank or Israel); *see also* *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 248 (D.D.C. 2015) (rejecting plaintiffs claim that foreseeable harms to Americans was sufficient for the exercise of specific jurisdiction).

States Courts. Prior to *Daimler* those plaintiffs were able to use general jurisdiction to find relief against terrorists and their sponsors in American courts.

## 2. The *Daimler* and *Goodyear* General Jurisdiction Framework

Exercising general jurisdiction is often the only way to bring terrorists and organizations that sponsor terrorism into United States District Courts when they have injured American citizens abroad. While specific jurisdiction gives courts jurisdiction over defendants based on their acts or connections giving rise to a cause of action in a particular forum, general jurisdiction treats a party as amenable to any suit for any reason in a forum where they are “essentially at home.”

The Supreme Court has spoken thoroughly on specific jurisdiction from *Pennoyer v. Neff*,<sup>77</sup> decided in 1877, through *Walden v. Fiore*,<sup>78</sup> decided in 2014. Yet only four decisions since *International Shoe*, in 1945, have dealt with general jurisdiction.<sup>79</sup> In the specific jurisdiction context, courts ask if a defendant’s contacts with a forum are continuous and systematic, and even if they are not, whether their activity in a forum was so substantial as to render them subject to a court’s jurisdiction based on a single activity alone.<sup>80</sup> Comparatively, in the general jurisdiction context, based on the Supreme Court’s most recent decisions in *Goodyear Dunlop Tires Operations S.A. v. Brown*<sup>81</sup> and *Daimler AG v. Bauman*,<sup>82</sup> courts must ask whether a defendant’s activities or connections with a forum are so substantial so as to render them “essentially at home” in that jurisdiction.<sup>83</sup> While this note focuses on terror groups and non-sovereign state organizations which sponsor terror like the PA and PLO, the “essentially at home” general jurisdiction standard developed by the Supreme Court was decided in the context of foreign corporations.<sup>84</sup> Despite this context, the framework is applied in

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<sup>77</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1877).

<sup>78</sup> *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

<sup>79</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945). The four cases since are: *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

<sup>80</sup> *Int’l Shoe Co.*, 326 U.S. at 310.

<sup>81</sup> *Goodyear*, 131 S. Ct. 2846.

<sup>82</sup> *Daimler*, 134 S. Ct. 746.

<sup>83</sup> *Goodyear*, 131 S. Ct. at 2851.

<sup>84</sup> See cases cited *supra* note 79.

the same way to the PA and PLO, which are typically treated by the courts as unincorporated associations.<sup>85</sup>

Prior to *Goodyear*, the Court never used the “essentially at home” language. In *Helicopteros Nacionales de Colombia S.A. v. Hall*,<sup>86</sup> the Court asked whether a defendant’s contact with a jurisdiction was “continuous and systematic” as the basis of general jurisdiction. The prior “continuous and systematic” language as compared to the contemporary “essentially at home” language was a farther reaching approach to general jurisdiction. Even so, some Supreme Court justices, like Justice Brennan, expressed concern that the “continuous and systematic” standard was not expansive enough. In *Helicopteros*, Justice Brennan dissented from the “continuous and systematic” standard, saying that the Court had placed too “severe limitations on the type and amount of contacts that will satisfy the constitutional minimum,”<sup>87</sup> especially given “[t]he vast expansion of our national [interests] during the past several decades [which] has provided the primary rationale for expanding the permissible reach of a State’s jurisdiction.”<sup>88</sup> Ultimately, Justice Brennan’s view did not prevail, and the Court has moved away from even a moderately expansive view of general jurisdiction with the adoption of its *Goodyear/Daimler* framework.

The current general jurisdiction framework was first articulated in *Goodyear* and then expanded upon in *Daimler*. In *Goodyear*, two thirteen-year-old boys from North Carolina were killed while abroad in France when Goodyear tires, manufactured in Turkey, catastrophically failed and caused their bus to crash while the boys were traveling to the airport.<sup>89</sup> The plaintiffs sued Goodyear, an American corporation, and its foreign subsidiaries in North Carolina.<sup>90</sup> Even though Goodyear’s foreign subsidiaries had their products enter “the stream of commerce”<sup>91</sup> and could be found in American markets, the court held that Goodyear’s subsidiaries were not subject to general jurisdiction in United States courts.<sup>92</sup> The Supreme Court explained that

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<sup>85</sup> See *supra* notes 48–53 and accompanying text.

<sup>86</sup> *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408 (1984).

<sup>87</sup> *Id.* at 420.

<sup>88</sup> *Id.* at 422.

<sup>89</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

<sup>90</sup> *Brown v. Meter*, No. 05 CVS 1922, 2008 WL 8187601 (N.C. Apr. 25, 2008). While Goodyear’s foreign subsidiaries appealed the court’s exercise of personal jurisdiction over them in *Goodyear*, Goodyear USA, an American corporation, did not contest the court’s exercise of personal jurisdiction over it. See *Goodyear*, 131 S. Ct. at 2851–52.

<sup>91</sup> See *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) (holding that placing an item “into the stream of commerce” is only sufficient if the defendant expected his product to be purchased in the ultimate forum state).

<sup>92</sup> *Goodyear*, 131 S. Ct. at 2851.



“[a] court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them *essentially at home* in the forum State.”<sup>93</sup> The court went on to explain that “[a] connection so limited [like stream of commerce] . . . is an inadequate basis for the exercise of general jurisdiction.”<sup>94</sup> According to the Court, such attenuated connections are insufficient as proof that a defendant is “essentially at home” in a forum sufficient to subject them to answer “claims unrelated to anything that connects them to the State.”<sup>95</sup> This more stringent “essentially at home” standard protects defendants who otherwise would not expect to litigate in foreign jurisdictions and represents a growing concern for international comity in an increasingly globalizing world.<sup>96</sup>

The Court made its most recent comment on general jurisdiction in *Daimler AG v. Bauman*.<sup>97</sup> In *Daimler*, twenty-two Argentinians filed suit in United States District Court for the Northern District of California against Daimler, a German corporation, based on alleged collaboration between Mercedes Benz-Argentina, a subsidiary of Daimler, and Argentinian security forces during Argentina’s “Dirty War” to “kidnap, detain, torture, and kill” Mercedes Benz-Argentina workers.<sup>98</sup> Plaintiffs claimed jurisdiction over Daimler in the Northern District of California was proper because Mercedes Benz USA, LLC, another Daimler subsidiary, distributed Daimler-manufactured vehicles throughout the United States.<sup>99</sup> Even though Daimler conducts 2.4% of its worldwide sales, or \$4.6 billion of business in California alone, the court concluded it was not subject to general jurisdiction in this forum.<sup>100</sup>

The Supreme Court explained, “*Goodyear* made clear that only a limited set of affiliations . . . will render a defendant amenable to [general] jurisdiction.”<sup>101</sup> The *Daimler* plaintiffs advocated for the “exercise of general jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business’” but the Court

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<sup>93</sup> *Id.* at 2851 (emphasis added).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2857.

<sup>96</sup> See *infra* notes 107–111 and accompanying text discussing the Supreme Court’s articulated concern for international comity.

<sup>97</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>98</sup> *Id.* at 751; see *Dirty War*, ENCYC. BRITANNICA (Mar. 20, 2014), <https://www.britannica.com/event/Dirty-War> [<https://perma.cc/M478-FLPR>].

<sup>99</sup> *Daimler*, 134 S. Ct. at 751–52.

<sup>100</sup> *Id.* at 766–67.

<sup>101</sup> *Id.* at 760.

considered such a formulation “unacceptably grasping.”<sup>102</sup> Ultimately, the Court said the paradigm for the exercise of general jurisdiction for an individual “is the individual’s domicile” and “for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. . . . [T]he place of incorporation and principal place of business.”<sup>103</sup> The Court noted however, “*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business.”<sup>104</sup> Thus, there may be some circumstances where a defendant has such significant contacts with a forum that it may be subject to general jurisdiction there, but *Daimler* implies that this is a very high threshold to meet, as billions of dollars of business was not significant enough in terms of contacts with California to render *Daimler* “essentially at home” in the Northern District of California.

In *Daimler* the Court indicated that one of its principal motivations for its restriction on the availability of general jurisdiction was the concern for international comity,<sup>105</sup> or the mutual respect and recognition between nations regarding their various judicial, legislative, and executive enactments.<sup>106</sup> The Court explained that “[o]ther nations do not share [the United States’s] uninhibited approach to [general] jurisdiction,” and furthermore that “foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international agreements.”<sup>107</sup> Thus, with regard to personal jurisdiction, the “Court has increasingly [focused] on the ‘relationship among the defendant, the forum, and the litigation’”—meaning that the Court is more concerned with “specific jurisdiction” while “general jurisdiction has come to occupy a less dominant place in the contemporary scheme.”<sup>108</sup> In *Daimler*, the court reaffirmed its *Goodyear* holding that the inquiry for general jurisdiction “is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it]

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<sup>102</sup> *Id.* at 761.

<sup>103</sup> *Id.* at 760 (internal citations omitted).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 763.

<sup>106</sup> *Comity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>107</sup> *Daimler*, 134 S. Ct. at 763.

<sup>108</sup> *Id.* at 758.

essentially at home in the forum State.”<sup>109</sup> Ultimately, these cases represent the upward trend of the already exacting threshold that must be met for a court to exercise general jurisdiction over a defendant and furthermore exemplifies the increasingly marginal role of general jurisdiction in modern jurisprudence. The circumscription of general jurisdiction creates an issue for bringing state sponsors of terror like the PA and the PLO into American courts because general jurisdiction is often the only means through which U.S. courts can exercise personal jurisdiction over such organizations.<sup>110</sup>

### 3. Issues with the *Daimler* and *Goodyear* General Jurisdiction Framework

The Supreme Court’s *Daimler/Goodyear* framework is problematic for three main reasons with regard to terrorist sponsoring organizations like the PA and the PLO. First, concern for international comity should not be the concern of the courts, but rather should be handled by elected policy makers. Even so, any risk or concern for international comity is minimal at best as the PA and PLO are stateless organizations, their terror activities attract ire, and the United States does not recognize a Palestinian state. While other nations recognize a Palestinian state and may take issue with the United States’ treatment of the PA and PLO in its court system, foreign policy considerations should be at the nadir of a court’s concerns when terror victims come into U.S. courts seeking justice for the horrors they have suffered abroad.<sup>111</sup>

Second, the Supreme Court has only directly applied general jurisdiction to corporations and individuals. Exercising general jurisdiction over unincorporated associations or non-sovereign state organizations like the PA and PLO could be considered a case of first impression for the Supreme Court and thus there is room within the present legal framework to bring the PA and PLO into American courts without disturbing the existing *Daimler/Goodyear* framework. Specifically, an analysis of the Antiterrorism Act of 1992 (ATA) shows that a restrictive view of exercising jurisdiction over terrorist defendants runs counter to Congressional intent. When Congress passed the ATA in 1992, they did so to give American victims of terror attacks abroad an avenue for recourse, irrespective of jurisdictional

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<sup>109</sup> *Id.* at 761 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)).

<sup>110</sup> See *supra* Section I.B.1.

<sup>111</sup> See *infra* Section I.C.

hurdles, in American federal courts.<sup>112</sup> The court can and should find a way to give life to this intent.

Third, in Footnote 19 in *Daimler* the court indicated “[w]e do not foreclose the possibility that in an exceptional case . . . a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”<sup>113</sup> The Court went on to say that Daimler’s \$4.2 billion of economic activity “plainly [does] not approach that level.”<sup>114</sup> Although the Court has not indicated what an “exceptional” case would look like, there are compelling policy reasons to treat terror cases as “exceptional.” Americans injured in terror attacks abroad must be afforded an avenue for recourse in American courts, especially in a post-9/11 era with more attacks aimed at American and other Western citizens. The PA and the PLO, as sponsors of terror activities and in light of their significant lobbying and fundraising activities in America,<sup>115</sup> should be considered “exceptional” as alluded to in the *Daimler* footnote. Such a classification of terror groups or sponsors of terror who lobby, or even recruit in the United States, would allow district court judges to exercise general jurisdiction over groups like the PA and the PLO. District court judges could do so without disturbing the exceedingly high “at home” standard articulated in *Goodyear* and *Daimler*, and without impacting the Court’s concern for international comity as no respect need be extended by our government to those who seek to perpetuate international terror. The Court’s concern with comity was never to protect terrorists who kill or maim Americans abroad.<sup>116</sup>

### C. *Anti-Terrorism Act of 1992*

The Antiterrorism Act of 1992 (ATA) was passed to remove jurisdictional hurdles for terror victims to bring their attackers into American courts, but the recent treatment of general jurisdiction by the D.C. District Court has proven fatal to this statute. The ATA permits “[a]ny national of the United States injured in his or her person, . . . by . . . an act of

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<sup>112</sup> See *infra* Section I.C.

<sup>113</sup> *Daimler*, 134 S. Ct. at 761 n.19 (internal citations omitted).

<sup>114</sup> *Id.*

<sup>115</sup> *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 323 (2d Cir. 2016).

<sup>116</sup> See *Daimler*, 134 S. Ct. at 763 (offering international comity as a rationale for a restrictive holding on general jurisdiction); see also *Perkins v. Benguet Consol. Mining Corp.*, 342 U.S. 437, 444–45 (1952) (The concern with general jurisdiction has always been a concern regarding fairness to the corporation.).

international terrorism . . . [to] sue . . . in any appropriate district court of the United States” in any district where the plaintiff resides.<sup>117</sup> A court will only dismiss an action brought under the ATA for inconvenience if “the action may be maintained in a foreign court . . . [and] that foreign court is *significantly* more convenient . . . and . . . offers a remedy which is *substantially the same* as the one available in the . . . United States.”<sup>118</sup> The ATA makes it exceedingly difficult for a defendant involved in a terror case to have a case removed from American courts because the statute requires: (1) a foreign court have jurisdiction; (2) that the court be significantly more convenient; and (3) that the foreign court’s available remedy be almost identical to that which would be available in a United States District Court.<sup>119</sup> As the ATA provides for treble damages, inclusive of court costs and interest, it is unlikely that a plaintiff will find a remedy almost identical to that which would be available in a U.S. court. Congress intentionally created an onerous removal framework so American terror victims would have the ability to file their cases in American courts and litigate their cases where it is convenient for them to do so, not their terrorist attackers or their sponsors.

In addition to removing jurisdictional hurdles for American citizens,<sup>120</sup> Congress passed the ATA to provide victims with significant money damages.<sup>121</sup> Senator Grassley, one of the bill’s main advocates, indicated the intent of the ATA is to allow American victims of terror to bring the terrorists into court for money damages.<sup>122</sup> He noted that money damages are essential to the ATA not only to compensate the victim, but also because syphoning money from terror organizations strikes at their lifeblood and has the potential to put them out of business.<sup>123</sup> To that end, the ATA’s allowance for plaintiffs to receive treble damages, to recover the costs of their suit, and receive attorney’s fees advances this goal.<sup>124</sup> Additionally, damages awards are provided to plaintiffs with interest and thus, in consideration of the often decades-long trajectory of

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<sup>117</sup> 18 U.S.C. § 2333(a) (2012).

<sup>118</sup> *Id.* § 2334(d) (emphasis added).

<sup>119</sup> *Id.*

<sup>120</sup> The ATA provides for treble damages as well as recovery of court costs and attorneys fees in any actions pursued under this statute. *See id.* § 2333(a).

<sup>121</sup> 137 CONG. REC. 3304 (1991) (statement of Sen. Grassley) (“The Anti-Terrorism Act removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation.”).

<sup>122</sup> 138 CONG. REC. 33,628–29 (1992) (statements of Sen. Grassley).

<sup>123</sup> *Id.* at 33,629.

<sup>124</sup> *Id.*; *see* 18 U.S.C. § 2333(a) (2012).

terror litigation, interest on damages awards is often substantial.<sup>125</sup> The ATA's damages award structure has allowed for plaintiffs to recover significant sums of money, like in *Sokolow*, where the damages, trebled and with interest, will likely be as much as \$1.1 billion, or close to a third of the PA's operating budget.<sup>126</sup> In fact, the damages award to the forty plaintiffs in *Sokolow* was so substantial the Obama Administration considered intervening to ask the court to consider reducing the award.<sup>127</sup>

Interestingly, the ATA was initially advocated for in response to an act of terror perpetrated by the PLO in 1985.<sup>128</sup> In *Klinghoffer v. S.N.C. Achille Lauro*,<sup>129</sup> Palestinian terrorists seized the Achille Lauro, an Italian passenger liner sailing in the Mediterranean Sea, and shot a handicapped sixty-nine-year-old Jewish-American passenger, Leon Klinghoffer, while he was on vacation with his wife and their family friends.<sup>130</sup> During the hijacking, four PLO hijackers separated Klinghoffer from his wife, shot him, and then threw him and his wheelchair overboard.<sup>131</sup> Klinghoffer's wife sued the PLO in the Southern District of New York, which ruled they *could* exercise jurisdiction over the PLO.<sup>132</sup> When discussing the ATA at a session of Congress in 1991, Senator Grassley referenced *Klinghoffer* saying "[l]ast June a New York Federal District Court ruled . . . that the U.S. courts have jurisdiction over the PLO. The New York court set the precedent; [the ATA] would codify that ruling and make[] the right of American victims definitive."<sup>133</sup> Congress passed the ATA with the specific purpose of removing the jurisdictional hurdles that would otherwise prevent American victims of terror from an avenue of recourse against their attackers, but *Daimler* and *Goodyear* have interfered with that goal.

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<sup>125</sup> See, e.g., Singman, *supra* note 17.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 138 CONG. REC. 33,628–29 (1992) (statements of Sen. Grassley).

<sup>129</sup> *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990).

<sup>130</sup> William E. Smith, *Terrorism: The Voyage of the Achille Lauro*, TIMES (Oct. 21, 1985), <http://content.time.com/time/subscriber/article/0,33009,960163-1,00.html> [<https://perma.cc/RU22-MXLW>] (noting Leon Klinghoffer was sixty-nine). The article recounts the shooting of Klinghoffer from the perspective of then Italian Ambassador to Egypt, Giovanni Migliuolo. Migliuolo describes, "The hijackers pushed (Klinghoffer) in his chair and dragged him to the side of the ship, where, in cold blood, they fired a shot to the forehead. Then they dumped the body into the sea, together with the wheelchair." *Id.*

<sup>131</sup> *Klinghoffer*, 937 F.2d at 47; see *Klinghoffer*, 739 F. Supp. at 856.

<sup>132</sup> *Klinghoffer*, 739 F. Supp. at 863; see also *Klinghoffer v. S.N.C. Achille Lauro*, 795 F. Supp. 112, 114 (S.D.N.Y. 1992).

<sup>133</sup> *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 495 (E.D.N.Y. 2012) (quoting 137 CONG. REC. 8143 (1991) (statements of Sen. Grassley) (emphasis omitted)).

While the ATA was intended as a broad remedy for Americans injured or killed by terrorist attacks abroad, the ATA remained virtually unused until the post-September 11th era.<sup>134</sup> In *Boim v. Quranic Literacy Institute & Holy Land Foundation*,<sup>135</sup> the parents of a seventeen-year-old, David Boim, filed a lawsuit in the Northern District of Illinois following an attack in which their son was gunned down while visiting the West Bank. The Boim family sued not only the terrorist attackers, but also the charity groups that funded the terrorists, claiming they were front organizations for the terror group Hamas.<sup>136</sup> The *Boim* case was the first to assert liability for organizations under the ATA “based solely upon the defendants’ knowledge that their funds were being used to conduct acts of international terrorism.”<sup>137</sup>

*Boim* was appealed to the Seventh Circuit, which convened to hear argument on the issue two weeks after the September 11, 2001 attacks.<sup>138</sup> The Court found the ATA was intended “to extend civil liability for acts of international terrorism to the full reaches of traditional tort law.”<sup>139</sup> The court held the ATA “should be interpreted in light of Congress’s subsequent enactment of [18 U.S.C. § 2339A, a criminal statute that] outlaws the provision of material support to any international terrorist group or terrorist act.”<sup>140</sup> Therefore, the Seventh Circuit determined that providing financial support to terrorists, so long as the donor has some “knowledge of and intent to further the [terrorist-]payee’s violent criminal acts,” creates liability under the ATA.<sup>141</sup> The ATA not only affords jurisdiction over defendants who commit terrorist attacks themselves, but also, together with the necessary scienter requirement, allows plaintiffs to reach entities a step removed from the attack so long as those entities realize the money they are providing to organizations may be used to fund an act of terrorism.<sup>142</sup> *Boim* clearly established that the ATA allows plaintiffs to reach both their terrorist attackers and sponsors of terrorism.

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<sup>134</sup> John D. Shipman, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 536 (2008).

<sup>135</sup> *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000 (7th Cir. 2002).

<sup>136</sup> Shipman, *supra* note 134, at 537.

<sup>137</sup> *Id.*

<sup>138</sup> *Boim*, 291 F.3d at 1000.

<sup>139</sup> *Id.* at 1010.

<sup>140</sup> Shipman, *supra* note 134, at 538 (alteration in original) (footnote omitted).

<sup>141</sup> *Id.* at 539.

<sup>142</sup> *Id.* at 538.

Prior to *Daimler* and *Goodyear*, the ATA and the “continuous and systematic” general jurisdiction framework worked in concert with each other. In fact, in *Estate of Klieman* and *Livnat*, the D.C. District Court judges exercised general jurisdiction against the PA and the PLO in lawsuits brought under the ATA. In the opinions, the judges found that the PA and PLO had “‘continuous and systematic’ contacts with the United States”<sup>143</sup> sufficient to exercise general jurisdiction over both entities.

*Daimler*, according to the D.C. District Court, represented an intervening change in the law such that they could no longer say, under the “essentially at home” standard that the PA and PLO were subject to the general jurisdiction of United States District Courts. For instance in *Estate of Klieman*, the circuit court held that despite its previous decision that it could exercise general jurisdiction over the PA and PLO, *Daimler* constituted an intervening change in the law; thus, the PA and PLO are not “essentially at home” in the United States and therefore not subject to its jurisdiction.<sup>144</sup>

Despite the broad intended reach of the ATA, as evidenced by its legislative history,<sup>145</sup> the Supreme Court’s decision in *Daimler* has weakened the reach and scope of the ATA and therefore has made it more difficult for American victims to bring their attackers and those who supported their attackers to justice. It is especially important for Americans to be able to bring sponsors of terror into court—rather than the terrorists themselves—because it is the sponsor organizations who most likely have the deepest pockets and the greatest ability to pay the significant damages awards that can be levied under the ATA.

## II. DISTRICT COURT APPLICATIONS OF THE *DAIMLER/GOODYEAR* FRAMEWORK

The Southern District of New York and the D.C. District Court have taken conflicting stances on the *Goodyear/Daimler* framework with regard to the PA and the PLO. While the Southern District of New York, in consideration of *Daimler*,

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<sup>143</sup> *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 239, 250 (D.D.C. 2015) (holding *Daimler*’s “at home” test constituted an intervening change in the law sufficient to deprive the court of its previously established personal jurisdiction over the PA and the PLO).

<sup>144</sup> *Id.* at 250.

<sup>145</sup> See *supra* note 133 and surrounding text. It is clear Congress remains steadfastly in favor of allowing American terror victims to sue their attackers and their sponsors in U.S. courts as evidenced by the recent passage of JASTA. See *supra* note 2.



has found a way to continue to exercise general jurisdiction over the PA and PLO in terror cases,<sup>146</sup> the District Court for the District of Columbia has said *Daimler* prevents its courts from exercising general jurisdiction over these organizations.<sup>147</sup> As this part explains, ultimately, the Southern District reached the right result, but for the wrong reasons.<sup>148</sup>

#### A. *The Southern District of New York Approach*

The Southern District of New York has found the exercise of general jurisdiction over the PA and PLO to be appropriate despite the Supreme Court's recent decisions in *Daimler* and *Goodyear*.<sup>149</sup> The Southern District's approach treats terrorism cases pursuant to the ATA as such "exceptional cases" that were alluded to in *Daimler*<sup>150</sup> and says that the PA and PLO—which are treated as unincorporated associations by United States District Courts—are not subject to the typical general jurisdiction analysis.<sup>151</sup>

In *Sokolow v. Palestine Liberation Organization*, Judge Daniels recognized that "[p]rior to . . . *Daimler* . . . [t]his Court . . . 'agree[d] with every federal court to have considered the issue that the totality of activities in the United States by the PLO and the PA justifie[d] the exercise of general personal jurisdiction.'"<sup>152</sup> Judge Daniels expressed understanding that *Daimler* raised concerns regarding the "risks to international comity" created by an expansive view of general jurisdiction, but said there is no concern with international comity presented by terrorism cases pursuant to the ATA against the PA and the PLO because these cases do "not conflict with any foreign country's applicable law or sovereign interests, nor is it in contravention of the laws of any foreign country."<sup>153</sup> Judge

<sup>146</sup> See *Sokolow v. Palestine Liberation Org.*, No. 04 Civ 397(GBD), 2014 WL 6811395, at \*2 (S.D.N.Y. Dec. 1, 2014).

<sup>147</sup> See *Estate of Klieman*, 82 F. Supp. 3d at 250.

<sup>148</sup> A critique of the Southern District of New York's approach will be offered *infra* in Section II.A of this note.

<sup>149</sup> See *Sokolow*, 2014 WL 6811395, at \*2. While the Supreme Court, of course, is binding on the Southern District of New York, the Southern District has found ways to sidestep the *Daimler* framework that will be discussed in the rest of this section.

<sup>150</sup> See *supra* text accompanying notes 123–126.

<sup>151</sup> *Sokolow*, 2014 WL 6811395, at \*2.

<sup>152</sup> *Id.* at \*1 (third and fourth alteration in original) (internal citation omitted).

<sup>153</sup> *Id.* at \*1–2. This argument of course seems premised on the fact that the United States does not recognize a Palestinian state. Should the United States begin to do so, which seems unlikely, Judge Daniels's comity analysis would be fundamentally altered as it would subject the government of the Palestinian people to litigation in American courts. Recognizing this weakness in Judge Daniels's argument, I will proceed

Daniels held that the Southern District has jurisdiction over the PA and the PLO pursuant to the ATA because the instant suit “presents such ‘an exceptional case,’ as alluded to in *Daimler*.”<sup>154</sup> He continued to observe that the “[PA and PLO] by their own admission are not . . . corporations and therefore are not subject to the traditional [jurisdiction] analysis.”<sup>155</sup> Rather, by treating cases involving stateless agents like the PA and the PLO, who sponsor terror activities abroad and conduct business in the United States, as “exceptional” under *Daimler*, a court can conclude that “the PA and PLO’s continuous and systematic business and commercial contacts within the United States are sufficient to support the exercise of general jurisdiction.”<sup>156</sup> Furthermore, Judge Daniels keenly observed the fact that technically, in the eyes of the United States, the PA and the PLO are not “at home” anywhere and thus are as much “at home” in the United States as they are anywhere else.<sup>157</sup>

Judge Daniels’s approach is justified in its end but incorrect in its means. To hold any group or organization without a formal home as “at home” in the United States if it conducts some business here is an overly expansive view of general jurisdiction and contradicts the Supreme Court’s move towards narrowed applications of the general jurisdiction framework. His approach ignores the fact that American courts are able to establish personal jurisdiction over the PA and the PLO, but they do so in the specific jurisdiction context with the PA and PLO classified as unincorporated associations or non-sovereign state organizations. In the specific jurisdiction context, the former classification allows for unincorporated associations to be sued and served wherever they have members. *Livnat* suggests the latter classification, non-sovereign government organizations, can be sued only under a theory of specific jurisdiction because they generally are not at home in the United States.<sup>158</sup> The Supreme Court has not commented specifically on how unincorporated associations or non-sovereign state organizations should be treated in the general jurisdiction context. As stated in Section I.A of this note, classified as either type of organization, the PA and PLO are not subject to personal jurisdiction in the United States.

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on the assumption that the United States will not recognize a Palestinian state in the foreseeable future.

<sup>154</sup> *Sokolow*, 2014 WL 6811395, at \*1–2.

<sup>155</sup> *Id.* at \*2.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> It is possible but rare and unusual for a foreign government to be at home in the United States. *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 30 n.12 (D.D.C. 2015).

Judge Daniel's instinct to use the "exceptional" case footnote was correct, but he should have instead advocated for the PA and the PLO to be treated as among an "exceptional" class of organizations that conduct lobbying activities in the United States—but otherwise lack a state or domicile—and use some portion of their funds to sponsor terrorist activities abroad that have injured American citizens. By classifying the PA and PLO as "exceptional," United States courts could treat stateless sponsors of terror who conduct business activity in the United States as an exception under *Daimler* sufficient for courts to give effect to the ATA and provide relief for Americans at home in United States courts.<sup>159</sup>

### B. *The D.C. District Court's Approach*

Several D.C. District Court judges have disagreed with the Southern District's treatment of *Daimler* as applied to the PLO and the PA in *Sokolow*. In *Klieman*, Judge Friedman disagreed with the Southern District, saying, "[i]t is not a defendants' burden to demonstrate a 'home' outside the United State[s], but the plaintiffs' burden to present a *prima facie* case that defendants are 'at home' in the United States."<sup>160</sup> Specifically, Judge Friedman said, "the PA and the PLO['] s] . . . contacts with the United States are not so continuous or systematic as to render them 'essentially at home'"<sup>161</sup> and thus the District Court had no grounds upon which to exercise general jurisdiction. While the D.C. judge correctly applied *Daimler* in form, in substance, Judge Friedman's approach would doom cases to dismissal whenever plaintiffs attempt to litigate against the PA and the PLO. In the eyes of the United States, these organizations have no home or state and thus it would be impossible for a plaintiff to meet his burden and prove where either organization is "at home." Judge Daniels avoided this inevitability by taking a negative-space approach to *Daimler*'s "essentially at home" analysis that seems well-suited to these types of cases. The D.C. District Court responded directly to Judge Daniel's argument that the PA and PLO are not "at home" anywhere<sup>162</sup> by arguing, without any concern for United States policy against recognizing a Palestinian

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<sup>159</sup> See *supra* Section I.C.

<sup>160</sup> Estate of *Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 246 (D.D.C. 2015).

<sup>161</sup> *Id.* at 250.

<sup>162</sup> See *id.*

state,<sup>163</sup> that the common sense treatment of where the PA and the PLO are “at home” is in Palestine as their names suggest.<sup>164</sup>

Soon after Judge Friedman dismissed *Klieman*, Judge Kollar-Kotelly dismissed *Livnat*, a similar decades-old terrorism case brought under the ATA using the post-*Daimler* framework. In *Livnat v. Palestinian Authority*, U.S. citizens were killed and injured following an attack at a Jewish holy site that was “carried out . . . by Palestinian Authority . . . security personnel.”<sup>165</sup> Judge Kollar-Kotelly dismissed the case with prejudice explaining that despite the fact that the Supreme Court has not specifically discussed the application of general jurisdiction beyond individuals and corporations, it is clear that both *Daimler* and *Goodyear* should apply beyond these two entities because the court used general language to describe the necessary contacts a corporation or individual would have to embody in order to satisfy *Daimler*’s “at home test.”<sup>166</sup>

This approach makes intuitive sense, because it encourages parity in how personal jurisdiction, whether general or specific, is applied across all types of jurisdictions. Courts should not exempt entire classes of associations from the general jurisdiction test simply because the Supreme Court has not had the opportunity to speak on how the test would apply to those types associations. Even so, had Judge Kollar-Kotelly ruled to exercise jurisdiction over the PA and PLO *because* the Supreme Court has been silent on how general jurisdiction applies to unincorporated associations and non-sovereign state organizations, she could have honored Congressional intent to ease jurisdictional hurdles in the terrorism litigation context and held in favor of the plaintiffs. Such a ruling would also highlight the perceived gap in procedural law so that Congress and the Supreme Court could better identify and address it in the future.

In the same opinion, Judge Kollar-Kotelly challenged the convention of treating the PA and PLO as unincorporated associations. She held that the PA and PLO should be treated as non-sovereign state organizations,<sup>167</sup> and pointed to precedent

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<sup>163</sup> In a recent vote at the UN, the United States exercised its veto power to vote against Palestinian statehood. Louis Charbonneau, *Palestinian Statehood Resolution Fails at U.N. Council, U.S. Votes Against*, REUTERS (Dec. 31, 2014), <http://www.reuters.com/article/us-mideast-palestinians-un-idUSKBN0K81CR20141231> [<https://perma.cc/ME44-7DVUJ>].

<sup>164</sup> *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 31 (D.D.C. 2015).

<sup>165</sup> *Livnat*, 82 F. Supp. 3d at 20–21.

<sup>166</sup> *Id.* at 28 (“While the Supreme Court did not enumerate paradigm all-purpose forums for other types of organizations, the Supreme Court never suggested that this particular inquiry would be any different for a defendant that was neither an individual nor a corporation.”).

<sup>167</sup> *Id.* at 26.

for such a classification. In *Toumazou v. Turkish Republic of North Cyprus*,<sup>168</sup> a D.C. district judge concluded that the Turkish Republic of Northern Cyprus was “at home” where its name suggests—in Northern Cyprus—despite its lack of a corresponding state.<sup>169</sup> Based on this analysis, Judge Kollar-Kotelly concluded the PA and PLO “should be amenable to suit for all purposes [in] the place where it governs. . . . [T]he West Bank, not the United States.”<sup>170</sup> If other courts and judges were to adopt Judge Kollar-Kotelly’s classification, they could treat the much narrower question of how general jurisdiction applies to non-sovereign state organizations as a matter of first impression rather than dealing with the more sweeping question of how general jurisdiction applies to unincorporated associations. While treating the PA and the PLO as unincorporated associations has proven workable and would continue to be as a matter of first impression in the general jurisdiction context, treating the PA and the PLO as non-sovereign state organizations would make more sense because not only is that precisely what they are, but using this narrow class of organization would also do less to disturb the court’s winnowing general jurisdiction framework. Additionally, this classification would put any future non-sovereign state organizations on notice by making it know how they will be treated by American courts if they seek to carry out violent and terroristic activities to achieve their ends, whatever they may be.

C. *Comparing the Southern District of New York’s and D.C. District’s Approaches*

The disparate treatments of *Daimler* by the Southern District of New York and the D.C. District fail to provide the predictable framework for terror-victim lawsuits Congress intended when it passed the ATA. Where the Southern District considers the PA and PLO as without a home, the D.C. District argues first that it is the plaintiff’s burden to prove they are “at home” in the United States, and second, that they are “at home” in Palestine, as their names would suggest, and therefore not subject to general jurisdiction in the United States. The burden the D.C. District places on plaintiffs would require the court to dismiss a plaintiff’s case against the PA and the PLO because it

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<sup>168</sup> *Toumazou v. Turkish Republic of North Cyprus*, 71 F. Supp. 3d 7 (D.D.C. 2014).

<sup>169</sup> *Id.* at 15.

<sup>170</sup> *Liunat*, 82 F. Supp. 3d at 30. Notably, the West Bank is not where the names of the PA or PLO suggest their homes should be.

is an impossible task for a plaintiff to prove the PA and the PLO are “at home” anywhere when indeed, as the Southern District suggests, they technically are “at home” nowhere. The Southern District—recognizing this procedural hurdle and perhaps in recognition of the Congressional intent motivating the ATA—appropriately sought to continue the line of pre-*Daimler* general jurisdiction decisions which found courts could exercise personal jurisdiction over the PA and the PLO.<sup>171</sup> Additionally, the Southern District approach ensures American plaintiffs can find relief and receive justice at home.

Furthermore, while the Southern District highlights that the Supreme Court has failed to address the applicability of general jurisdiction to non-individual, non-corporate entities, the D.C. judges have indicated there is no reason to presume *Daimler* was intended to be so limited given the broad language the Supreme Court used when discussing general jurisdiction in *Daimler* and *Goodyear*.<sup>172</sup> Here, the D.C. judges are likely correct that unincorporated associations are encompassed by the general jurisdiction framework, but that is not fatal to exercising general jurisdiction over organizations that conduct business in the United States and sponsor terrorist activities that may injure Americans abroad. Even so, how unincorporated associations are treated in the general jurisdiction context will remain an open question until the Supreme Court takes up the question. Even if the Supreme Court does, it is unlikely they would treat general jurisdiction more expansively with regard to unincorporated associations. However, the D.C. district judges’ suggestion that courts treat the PA and the PLO as non-sovereign state organizations presents an interesting opportunity. The Supreme Court could create precedent that non-sovereign state organizations are not “at home” where their names would suggest because, being governments without states, they are not “at home” anywhere, as Judge Daniels in the Southern District suggested.

The D.C. judges’ critique of the Southern District approach is incomplete. The D.C. judges failed to address the Southern District’s compelling argument that terrorism cases

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<sup>171</sup> See *Sokolow v. Palestine Liberation Org.*, No. 04 Civ 397(GBD), 2014 WL 6811395, at \*1 (S.D.N.Y. Dec. 1, 2014) (reasoning that “[p]rior to . . . *Daimler* . . . This Court . . . ‘agree[d] with every federal court to have considered the issue that the totality of activities in the United States by the PLO and the PA justifie[d] the exercise of general personal jurisdiction” (third and fourth alteration in original)). But see *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 250 (D.D.C. 2015) (holding *Daimler*’s “at home” test constituted an intervening change in the law sufficient to deprive the court of its previously established personal jurisdiction over the PA and the PLO).

<sup>172</sup> See *supra* text accompanying note 166.

under the ATA are exceptional cases pursuant to Footnote 19 in *Daimler*.<sup>173</sup> In *Daimler*, the Supreme Court indicated, “[w]e do not foreclose the possibility that in an exceptional case a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of *such a nature* as to render the corporation at home in that State.”<sup>174</sup> The Supreme Court failed to define what such an exceptional case would look like, but at least—it seems—in the business context, the standard is exceedingly high.<sup>175</sup> However, in light of Congressional intent surrounding the passage of the ATA<sup>176</sup> and the general desire to allow victims of terror to hold sponsors of terror and their attackers accountable in American courts, policy considerations seem to mandate that courts classify terror cases as exceptional pursuant to Footnote 19 of *Daimler*. By doing so, courts would not further injure American plaintiffs by dismissing with prejudice their cases against their terror attackers and those who sponsor them.

The unfortunate reality is, when American plaintiffs have their cases dismissed with prejudice abroad, these holdings often, but not always, have a *res judicata* effect in other international courts.<sup>177</sup> Thus, Ms. Klieman’s estate will never be made whole following the fatal machine gun attack that killed her while she was riding a public bus in Israel, nor will the Livnat estate be made whole after members of the Palestinian Authority killed American citizens abroad during an attack of a Jewish holy site. As stated during Congressional hearings on the ATA, the purpose of this statute is not only to compensate plaintiffs who have been injured or killed at the hands of terrorists or sponsors of terror, but also to cut away the lifeblood of terrorists by taking away their money.<sup>178</sup> It is precisely this deliberate framework that made possible the rendering of a potentially \$1.15 billion judgment against the PA and the PLO for the forty or so Americans who were horribly maimed or killed in *Sokolow*.<sup>179</sup>

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<sup>173</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014) (internal citations omitted).

<sup>174</sup> *Id.* (emphasis added).

<sup>175</sup> See *supra* text accompanying notes 86–88.

<sup>176</sup> See *supra* Section I.C.

<sup>177</sup> See *Enforcement of Judgments*, U.S. DEPT OF STATE BUREAU OF CONSULAR AFFAIRS, <http://travel.state.gov/content/travel/en/legal-considerations/judicial/enforcement-of-judgments.html> [<https://perma.cc/HL2B-CME3>].

<sup>178</sup> See *supra* Section I.C (which is in part why the ATA affords trebled damages, attorney’s fees, and court costs).

<sup>179</sup> See *supra* text accompanying notes 126–127.

### III. PROPOSED SOLUTIONS TO THE *GOODYEAR/DAIMLER* “AT HOME” PROBLEM

With the above in mind, there are two potential solutions to the problem the *Goodyear/Daimler* general jurisdiction framework has caused for Americans seeking to bring terrorists and sponsors of terrorism into American courts pursuant to the ATA. First, courts could conclude as a matter of law that unincorporated associations or non-sovereign state organizations that have operations in the United States and sponsor terror are subject to general jurisdiction in American courts. The second, stronger, and more parsimonious solution would be to rely on Footnote 19 in *Daimler* and treat terror cases as precisely the type of exceptional case to which the Supreme Court alluded. This would allow the Supreme Court to give effect to its concern for comity in the business and individual context while still allowing district courts to exercise personal jurisdiction over groups that terrorize Americans abroad like the PA and the PLO. As it stands, the Supreme Court’s holding in *Daimler* has frustrated Congress’s intention that the ATA function as a powerful statute that will ensure Americans who have been harmed at the hands of foreign terrorists can find justice at home free of procedural and jurisdictional hurdles.<sup>180</sup>

#### A. *Limiting the General Jurisdiction Framework to Corporations and Individuals*

In *Daimler*, the Supreme Court explained the general jurisdiction paradigm for individuals and for corporations, but made no comment on how the general jurisdiction framework would apply to unincorporated associations or non-sovereign government organizations. The paradigm for the exercise of general jurisdiction over an individual “is the individual’s domicile” and for a corporation “is an equivalent place, one in which the corporation is fairly regarded as at home . . . the place of incorporation and principal place of business.”<sup>181</sup> For reasons stated above,<sup>182</sup> it seems unlikely to conclude unincorporated associations are excepted from the *Goodyear/Daimler* framework, but the Court could easily do so if it wanted to because the question is still technically open. By treating unincorporated associations as a matter of first impression for the general

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<sup>180</sup> See *supra* Section I.C.

<sup>181</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

<sup>182</sup> See *supra* Section II.C.



jurisdiction framework, the Court could easily modify the general jurisdiction framework to encompass terrorist defendants and their sponsors. However, the Court may view this approach as over-inclusive because partnerships, and unions are also treated as unincorporated associations and they should not be subject to a disparate general jurisdiction framework as compared to their corporate and individual counterparts just so terrorists and their sponsors can be brought into American courts.

If the Court considers this position too extreme, they can instead consider the treatment of non-sovereign government organizations under general jurisdiction as a matter of first impression. This would be a more circumscribed and workable approach. In fact, the Southern District of New York suggested that requiring a plaintiff to prove where a stateless organization is “at home” is essentially a fool’s errand because it is “at home” nowhere. This suggests a non-sovereign state could almost never be hauled into American courts despite a history of jurisprudence preceding *Goodyear* and *Daimler* where American courts regularly exercised general jurisdiction over non-sovereign government organizations like the PA and the PLO. By choosing to classify non-sovereign state organizations as cases of first impression, courts would grant themselves an opportunity to avoid reaching the conclusion that cases against the PLO and PA must be dismissed; a conclusion that runs contrary to the intent of the ATA.

While simply categorizing the PLO and PA as either unincorporated associations or non-sovereign state organizations (and thus dubbing them as cases of first impression), may seem like a workable solution, there are issues with both of these approaches. Treating unincorporated associations differently from individuals and corporations would create an unevenly applied personal jurisdiction framework where unincorporated entities like partnerships would be subject to general jurisdiction for “continues and systematic contacts” but individuals and corporations could only be subject to general jurisdiction if they were “essentially at home.” Putting the inconsistent application of jurisdiction law aside, this solution would do nothing to address the Supreme Court’s concerns for international comity. Specifically with regard to non-sovereign government organizations, an official policy of treating such organizations as less than sovereign simply because they lack a state would be to quash fledgling populist movements which are issues of sovereignty that should be left for individual countries to resolve themselves. An official judicial policy treating non-sovereign

states as subject to general jurisdiction where their traditional sovereign counterparts are not would suggest an inherent American disapproval of such organizations simply because they lack the formality of a “home.”

*B. The “Exceptional Case” Daimler Footnote*

The better, simpler solution would be for the courts to declare that, especially in light of Congressional intent under the ATA and strong public policy considerations,<sup>183</sup> causes of action against terrorists and their sponsors are the type of “exceptional case” alluded to in Footnote 19 of *Daimler*. Again, the footnote reads, “[w]e do not foreclose the possibility that in an exceptional case . . . a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”<sup>184</sup> This footnote permits courts to place certain defendants outside of the *Daimler* “at home” framework if they are viewed as “exceptional” cases.

Courts should be free to declare that cases involving the PA and the PLO and any other similarly situated defendants who: (1) conduct business in the United States; and (2) sponsor terrorist activities that incidentally injure Americans abroad, are “exceptional” for purposes of Footnote 19 of *Daimler*. Terrorism should be treated as activity that is “of such a nature” to effectively render any defendant “at home” in the United States as a matter of law even if their activities would not otherwise rise to meet this high threshold. The Supreme Court’s specific jurisdiction framework already recognizes that certain “single or occasional acts” may be sufficient to subject a defendant to specific jurisdiction in a forum, so it would be an unadventurous corollary to make a parallel extension to general jurisdiction.<sup>185</sup> *Daimler* was decided relatively recently, but the “exceptional case” footnote is ripe for use.

Future litigation would allow the Supreme Court to create a specific framework and craft an “exceptional case” doctrine. In doing so the Supreme Court could be very specific in identifying what circumstances will constitute an “exceptional case” so as to protect the PA and the PLO as well as other similarly situated defendants from non-terror related litigation. The doctrine should require that a defendant: (1) direct

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<sup>183</sup> See *supra* Section II.C for a discussion of public policy considerations.

<sup>184</sup> *Daimler*, 134 S. Ct. at 761 n.19.

<sup>185</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011).

lobbying or business activities towards the United States (which do not rise to the “essentially at home” level, an exceedingly high standard<sup>186</sup>), and (2) have sponsored or directly carried out a terror activity that caused injury or death to an American abroad. This “exceptional case” doctrine would reinvigorate the ATA despite *Daimler* and allow American litigants to find justice at home. This doctrine would do little more than return general jurisdiction issues in terror litigation back to its pre-*Goodyear/Daimler* status quo. In fact, because the Court could so carefully craft the “exceptional case” doctrine, the framework could in fact strengthen international comity and relations by showing other nations that American courts respect their concerns regarding the far jurisdictional reach of American courts.

Under this doctrine, only an appropriate class of cases would meet the *Daimler* exception, whereas prior to *Daimler*, any foreign entity that regularly conducted business in America could be haled into United States courts. The “exceptional case” doctrine would recognize the PA and the PLO as organizations with some legitimate lobbying and advocacy operations, but would otherwise hold them strongly accountable for their unacceptable terrorism or terrorism sponsorship activities. Additionally, the United States would gain credibility with those nations that have recognized a Palestinian state by showing the United States recognizes the PA and the PLO as governing organizations, but only to the extent that they do not sponsor activities that injure, maim, or kill Americans abroad—actions that any organization should have to answer for in American courts. Without such an exception, Americans will continue to have their cases dismissed by American courts for want of personal jurisdiction over defendants like the PA and the PLO. Our judiciary cannot continue to harm American terror victims by continuing to deny them justice in American courts.

## CONCLUSION

Presently there exists a serious gap in U.S. general jurisdiction framework; Americans who have suffered enough at the hands of terrorists and their sponsors are now further injured in American courts. Without adjustment, the post-*Daimler* general jurisdiction framework will prevent Americans from having the opportunity to be made whole despite suffering serious harm or death at the hands of terrorists. Congress was clear

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<sup>186</sup> See *supra* notes 94–97 and accompanying text.

when it passed the ATA that it intended the statute to clear jurisdictional hurdles that could otherwise prevent Americans from making their attackers, and those who aid them, accountable in American courts. Beyond its purpose to make American terror victims whole, the ATA plays an important role in national security as well. The ATA allows American plaintiffs to receive treble damages, attorney's fees, and court costs, all with interest, in what are often protracted and decades long litigations. The judgments received pursuant to the ATA can often number in the hundreds of millions or billions of dollars and thus strike at the lifeblood of terror groups: their bank accounts. By attacking the bank accounts of these groups, plaintiffs are able to cripple their operations, thus limiting their ability to carry out future terror activities, and possibly put them out of business. It is clear that Congress continues to intend to allow Americans to find relief in U.S. courts, as evidenced by its recent passage—over a presidential veto—of the Saudi terror litigation bill, aptly named the Justice Against Sponsors of Terror Act.<sup>187</sup> While controversial, this bill ensures all American terror victims have a place to litigate their claims in U.S. courts despite who or how powerful the defendant.

Before *Goodyear* and *Daimler*, the courts' general jurisdiction jurisprudence gave effect to the legislative intent of the ATA, but in the post *Goodyear/Daimler* era, courts that previously and appropriately exercised general jurisdiction over the PA and the PLO now deny to do so. Treating *Goodyear* and *Daimler* as an intervening change in the law, these courts have concluded *Goodyear* and *Daimler* deprive them of jurisdiction in cases they previously heard and rendered judgment in. Consequently, courts have been forced to dismiss cases brought under the ATA with prejudice, leaving plaintiffs without remedy not only in United States courts, but also in other international forums. The Southern District of New York has sidestepped the Supreme Court's *Daimler* ruling, but the Supreme Court or Congress must take action to ensure Americans nationwide can find relief at home after falling victim to the horrors of terrorism. Creating an "exceptional case" doctrine pursuant to *Daimler* Footnote 19 would prevent the

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<sup>187</sup> Patricia Zengerle, *Congress Rejects Obama Veto, Saudi September 11 Bill Becomes Law*, REUTERS (Sept. 30, 2016), <http://www.reuters.com/article/us-usa-sept11-saudi-idUSKCN11Y2D1> [<https://perma.cc/AFD6-X586>] (The Senate voted in favor of this bill 97–1 with Senator Reid delivering the only no vote. Even Senator Schumer, one of Obama's strongest supporters in the Senate said, "[o]verriding a presidential veto is something we don't take lightly, but it was important in this case that the families of the victims of 9/11 be allowed to pursue justice, even if that pursuit causes some diplomatic discomforts.").

inconsistent administration of justice by U.S. courts and would help plug this troubling hole in our current general jurisdiction framework. With the continued rise of international terrorism aimed at America and other Western democracies, our courts must place justice for American terror victims, who have been injured, maimed, or killed abroad, among their highest priorities.

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